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No. 85-1262

In the Supreme Court of the United States

OCTOBER TERM, 1985

TEXAS ASSOCIATION OF CONCERNED TAXPAYERS, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner challenges the court of appeals' holding that the validity of the certification by the Clerk of the House of Representatives that the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324 *et seq.*, originated in the House of Representatives, presents a nonjusticiable issue.

1. Petitioner paid $4.66 in federal excise tax on its telephone bills for August and September of 1983 (Pet. App. A11). Of this sum, $3.11 was attributable to an excise tax increase effected by Section 282(a) of TEFRA. See Pub. L. No. 97-248, § 282(a), 96 Stat. 568 (now codified at 26 U.S.C. 4251). Petitioner brought this suit in the United States District Court for the Western District of Texas seeking a

refund of that $3.11 in additional telephone excise tax (Pet. App. A1). Petitioner alleged that TEFRA as a whole was unconstitutional because it had originated in the Senate in violation of the Origination Clause (U.S. Const. Art. I, § 7, Cl. 1).

The district court held that the enactment of TEFRA did not violate the Origination Clause and accordingly dismissed petitioner's complaint (Pet. App. A11-A12). The court of appeals affirmed the district court's judgment, but did so without reaching the merits (*id.* at A1-A10). It held that petitioner's claim presented a nonjusticiable political question, because resolution of the claim was a matter committed by the Constitution to the legislative branch. The court noted (*id.* at A7) that the engrossed copy of TEFRA presented to the President for his signature bears the certification of the Clerk of the House that the Act "originated in the House of Representative[s]." The court of appeals concluded that it was not in the judicial province to look behind Congress's determination as to the origin of a particular bill (*id.* at A8-A9).

2. Although the court of appeals' resolution of the justiciability issue is in our view correct, we recognize that at least one other court of appeals has held, in a case involving an Origination Clause challenge to TEFRA essentially identical to petitioner's, that the matter of TEFRA's origin is a justiciable question. See *Armstrong* v. *United States*, 759 F.2d 1378, 1380 (9th Cir. 1985). Several other courts of appeals have reached the merits of Origination Clause challenges to TEFRA without discussing justiciability. See *Wardell* v. *United States*, 757 F.2d 203 (8th Cir. 1985) (per curiam); *Heitman* v. *United States*, 753 F.2d 33 (6th Cir. 1984) (per curiam); *Rowe* v. *United States*, 749 F.2d 27 (3d Cir.) (Table), aff'g mem. 583 F. Supp. 1516 (D. Del. 1984). This disagreement among the circuits, however, presents an issue of academic interest only. As petitioner concedes (Pet.

9 & n.5), every appellate court that has reached the merits has held that the enactment of TEFRA did not violate the Origination Clause. *Armstrong* v. *United States*, 759 F.2d at 1381-1382; *Wardell* v. *United States*, 757 F.2d at 205; *Heitman* v. *United States*, 753 F.2d at 35; *Rowe* v. *United States*, 583 F. Supp. at 1519. Cf. *Moore* v. *United States House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, No. 84-389 (Jan. 7, 1985) (upholding dismissal of action brought by congressmen to challenge TEFRA on Origination Clause grounds). Since these decisions are correct and completely dispose of petitioner's claim for relief, there is no reason for the Court to grant certiorari in this case.

3. Contrary to the central theme of petitioner's submission, the bill that became TEFRA did originate in the House of Representatives. The bill that became TEFRA was introduced in the House as the Miscellaneous Revenue Act of 1981, H.R. 4961, 97th Cong., 1st Sess. (1981) (see Pet. App. A2). This bill was passed by the House and sent to the Senate on December 15, 1981. See 127 Cong. Rec. H9607, H9617 (daily ed. Dec. 15, 1981). The Senate proposed an amendment to the bill that supplanted the entire text of the House bill except for the enacting clause. The amended bill was passed by the Senate on July 22, 1982, renamed TEFRA, and sent back to the House. See 128 Cong. Rec. S9045-S9046 (daily ed. July 22, 1982). After considerable debate, the House voted to send the bill to conference. 128 Cong. Rec. H4777-H4788 (daily ed. July 28, 1982). The conference bill was passed by both the House and the Senate in August 1982 and sent to the President. The engrossed copy presented to the President bore a certification signed by the Clerk of the House, stating that TEFRA "had originated in the House of Representative[s]" (Pet. App. A7).

Despite this legislative history, petitioner maintains (Pet. 23-28) that TEFRA originated in the Senate because the initial House version of H.R. 4961 was projected to produce a substantial decrease in tax revenues, whereas the Senate version of H.R. 4961, which Congress ultimately passed, was projected to produce a substantial increase in tax revenues. According to petitioner, the requirement in the Origination Clause that "All Bills for raising Revenue shall originate in the House of Representatives" encompasses only those laws that increase taxes. It therefore follows, petitioner says, that H.R. 4961, although entitled the "Miscellaneous Revenue Act of 1981," was not a "Bill for raising Revenue" when it was proposed in the House, but instead was transformed into such a bill by the Senate.

The flaw in petitioner's analysis is its erroneous idea that the Origination Clause applies only to laws increasing taxes, as opposed to laws generally relating to revenues. Petitioner's interpretation is unsupported by any pertinent authority, is contrary to established congressional practice,* and has been uniformly rejected by the courts that have passed on the constitutionality of TEFRA. As stated by the Eighth Circuit in *Wardell* v. *United States,* 757 F.2d at 205:

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*See, *e.g.*, 2 A. Hinds, *Precedents of the House of Representatives* § 1489, at 949-953 (1907). The examples of Senate-originated bills to reduce or repeal taxes cited by petitioner (Pet. 14-16) are either pre-Civil War enactments of doubtful relevance under modern congressional practice, or else are incidental provisions in bills primarily intended for other purposes, such as the exercise of legislative authority over the District of Columbia, the regulation of interstate commerce and commerce with the Indian tribes, and the making of rules to regulate the status of members of the United States armed forces. This Court and the other courts that have considered the question have uniformly held that such incidental revenue provisions do not make a bill intended for other purposes subject to the Origination Clause. *E.g., Twin City Bank* v. *Nebeker,* 167 U.S. 196, 202 (1897); *United States* v. *Norton,* 91 U.S. 566, 569 (1875); *Bertelsen* v. *White,* 65 F.2d 719, 722 (1st Cir. 1933).

> We cannot agree that "revenue-raising" means only bills that increase taxes. Although the bill was dramatically altered by amendment in the upper house of Congress, it remained a revenue bill, regardless whether it raised taxes or lowered them.

Accord, *e.g.*, *Armstrong* v. *United States*, 759 F.2d at 1381-1382; *Heitman* v. *United States*, 753 F.2d at 35. See *Jolly* v. *United States*, 764 F.2d 642 (9th Cir. 1985).

The decisions rejecting petitioner's position follow from this Court's decision in *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911). That case involved an Origination Clause challenge to a revenue bill that was introduced in the House as a measure creating an inheritance tax, but which the Senate amended to establish a corporate tax instead. The Court held (220 U.S. at 143) that the enactment of the bill did not violate the Origination Clause, because (1) the bill had originated in the House and (2) the Senate amendment was "germane to the subject—matter of the bill [viz., revenue collection] and not beyond the power of the Senate to propose." In so holding, the Court found unpersuasive the argument that the Senate measure, ultimately passed by Congress, increased corporate taxes and was likely to raise total taxes to a greater extent than the proposed House bill.

Precisely the same reasoning applies here. The bill that became TEFRA, H.R. 4961, originated in the House. And the Senate amendment, as the court of appeals held (Pet. App. A9-10) and as petitioner now concedes (Pet. 8 n.4), was germane to the subject matter of the House bill and was "not beyond the power of the Senate to propose" (*Flint* v. *Stone Tracy Co.*, 220 U.S. at 143). The courts of appeals are thus correct in their uniform conclusion that the enactment of TEFRA did not violate the Origination Clause.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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